City of Salinas
Office of the City Attorney - 200 Lincoln Avenue, Salinas, California 93901 - (831) 758-7256 - Fax (831) 758-7257

Vanessa W. Vallarta, City Attorney
Susan J. Matcham, Assistant City Attorney
Christopher A. Callihan, Sr. Deputy City Attorney
Georgina B. Mendoza, Deputy City Attorney

December 5, 2008

VIA FACSIMILE and U.S. MAIL

Ross Johnson, Commissioner and Chair
Commissioners Timothy A. Hodson, A. Eugene Huguenin, Jr.,
Robert Leidigh, and Ray Remy
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
428 J Street
Suite 800
Sacramento, California 95814-2329

Re: Proposed New Regulation: Title 2 Cal. Code Regs., § 18420.1
December 11, 2008 Agenda, Item 17

Dear Chairman Johnson and Members of the Commission:

On behalf of the City of Salinas and as counsel for the City in the Vargas, et al. v. City of Salinas, et al. matter now pending before the California Supreme Court (Case No. S140911), we write to express again our objection to the above-referenced proposed new regulation and its consideration for passage at this time.

We previously wrote to the Commission on September 9, 2008 relating to the pre-notice meeting concerning this proposed regulation, and participated in the Interested Persons Meeting held on October 7. We have reviewed the version of the proposed regulation modified since the Interested Persons meeting, which is now proposed for Adoption on the Commission's December 11, 2008 agenda.

Although we appreciate some of the revisions that have been made to the proposed regulation, for the reasons set forth in this letter, we urge the Commission to exercise restraint and refrain from adopting any regulation at this time.

A. The FPPC Should Not Regulate on Subject Matter Now Pending Decision by the California Supreme Court

The FPPC should not regulate at this time because very issues the proposed regulation aims at are before the California Supreme Court. The Court is currently considering the very issue of the standard for permissible government speech relating to a pending ballot measure.

Coming at this time, when the parties and *amici curiae* have thoroughly research and analyzed these issues in briefing that has been complete and closed some time ago, the regulation attempts to affect the outcome and reasoning of the case pending before the California Supreme Court and, thereby, interfere with the litigation and the judicial process. The proper way to weigh in on the issues before the Supreme Court would have been to submit to the court an *amicus curiae* brief.

It is unknown what the Court will say is the proper constitutional standard. Therefore, it is possible the proposed new regulation may run afoul of it, requiring additional regulatory action after the opinion to correct the regulation to conform to the opinion or rescind the regulation.

B. <u>The Proposed Regulation Runs Afoul of Constitutional Law Decisions, by Imposing a Vague Standard of Conduct on Governmental Entities, Elected Officials, and Staff, and Continues to Contravene the Legislature's Enacted Standards Regulating Government Speech Concerning Ballot Measures</u>.

There is no need for further regulation, particularly one which contains a different test than Regulation section 18225, when the <u>Legislature</u> has dictated that these definitions under Government Code sections 82015 and 82025 apply to statements by local agencies concerning ballot measures.

Of particular interest to the issues before this Commission, the legislative documents expressly reference the *Stanson v. Mott* decision ((1976) 17 Cal.3d 217) and its "style, tenor and timing" test (and the Attorney General Opinion following it).[1] Nevertheless, the enacted version of the 82025 statute makes illegal only government expenditure of public funds on materials which "expressly advocate", which is defined in section 18225.

Thus, the Legislature has stated that the government may speak concerning a ballot measure unless its statement contain either the "magic words" or the entirety of the statements unambiguously urges a particular result.

The staff memorandum and the proposed new regulatory standard ignores U.S. Supreme Court authority that limits restrictions on campaign speech to pure express advocacy (e.g., vote yes, vote no, etc.), including recent cases following *Buckley v. Valeo* (1976) 424 U.S. 1, 43-44 & fn. 52, 77, 80 & fn. 108. (See also *California Pro-Life Council, Inc. v. Getman* (9th Cir. 2003) 328 F.3d 1088; *Center for Individual Freedom v. Carmouche* (5th Cir. 2006) 449 F.3d 655, 663-666, *cert. den.* 127 S.Ct. 2258, 167 L.Ed.2d 1092 (2007); *Fed. Elec. Comm'n v. National Conservative Political Action Committee* (1985) 470 U.S. 480, 493-494, 496-497, 498, 500-501; *Fed. Elec. Comm'n v. Massachusetts Citizens for Life, Inc.* (1986) 479 U.S. 238, 248-250 (opn. of Brennan, J.); *id.*, at p. 265 (opn. of O'Connor, J.); *Fed. Elec. Comm'n v. Wisconsin Right to Life, Inc.* (2007) ___ U.S. ___ [127 S.Ct. 2652, 2671-2684, 168 L.Ed.2d 329]; *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 469-471; *Fed. Elec. Comm'n v. Furgatch* (9th Cir. 1987) 807 F.2d 857, 863-864; *Kidwell v. City of Union* (6th Cir. 2006) 462 F.3d 620, 621-625 ["[I]t is imperative that government be free to make unpopular decisions without opening the public fisc to opposing views."], *cert. den.* 127 S.Ct. 938, 166 L.Ed.2d 704 (2007), all of which confirm the necessity for a bright-line standard to avoid unconstitutional vagueness and overbreadth.) These and other cases recognize that the defining

---

[1] See, e.g., Sen. Elec. & Reapport. Comm'tee Hrg. June 21, 2000, Assem. Bill No. 2078 (1999-2000 Reg. Sess.), p. 3 [**<u>suggesting "accurate, fair and impartial" as a test is vague</u>**].

what is reportable defines what is "campaigning" and, thereby, also the legality of a statement. (*See also* Govt. Code, §§ 8314, 91000 *et seq.*; Pen. Code, § 424.)

This regulation, as revised, requiring a "fair and impartial" statement of the "facts" "related to" the ballot measure, would violate these important Constitutional principles announced by the U.S. Supreme Court, as each of these quoted concepts is vague and cannot be assessed with reasonable certainty in the ordinary course of conduct in advance of potential regulatory, prosecutorial or judicial challenge.

C. **Even as Modified Following the Interested Persons' Meeting, the Proposed Regulation Continues to Imperil Ordinary Staff Activities and Government Operations Assessing the Effect of and Preparing for Passage of Ballot Measures**

A regulation which generally prohibits local governments from providing information about ballot measures unless it is fair and impartial creates numerous issues, and potentially could wreak havoc on public entities in providing information to the public concerning the potential effects of a proposed ballot measure.

Although the proposed regulation has been modified to attempt to protect certain staff functions and matters occurring at official public meetings, it remains unconstitutionally vague.

No provision is made even attempting to define or outline what will be considered fair and impartial and how far the agencies' statements must go in including potential differing viewpoints in order to be insulated from suit that it is not fair and impartial. Further, staff reports assessing the effect of pending ballot measures on government operation may still be subject to attack. Staff reports are not considered a statement of the government entity's position (see new subdivision (c)(1) of the proposed regulation) unless the governing body acts, by resolution, for example, to adopt the staff analysis. Likewise, new subdivision (c)(4) fails to define what constitutes a "public ... organization" or when a staff analysis is to be considered presented pursuant to a request. Does "public organization" include governmental entities? And do staff reports and assessments in the ordinary course of governmental operations constitute "requested" statements, or must the governing body formally request such staff evaluations on the record at a noticed public hearing, before staff members' reporting to their public-entity employer will be considered exempt from this regulation? For example, in the Vargas case, it was argued by Petitioners that *all* statements by staff and the government after the Elections Code section 9212 report (which occurs pre-qualification, before a measure is even "pending" on the ballot) is illegal government speech, which in turn is illegal expenditure of public funds.

The FPPC must recognize that the public prosecutors and private citizens rely on these regulations in asserting illegality of statements and illegality of expenditure of public funds. (*See*, e.g., Govt. Code, §§ 91000, 91001, 91003, 91004.) It is a practical reality that the opponents to the governments' analysis of the ballot measure who will be bringing litigation alleging such illegality, and basing their case on their disagreement with the government's assessments, relying on this proposed regulation to argue the government has not been fair and impartial because the government's evaluation does not accept the objectors' views.

//

//

For these reasons, the City of Salinas urges this Commission to refrain from taking any action to regulate on this issue before the California Supreme Court decides the issues and any further judicial review of the case is concluded. Thank you for your consideration of these comments.

Sincerely,

Vanessa W. Vallarta
City Attorney
CITY OF SALINAS

Joel Franklin, Esq.
LAW OFFICES OF JOEL FRANKLIN

cc: Mayor and City Council
City Manager
Patrick Whitnell, Esq., League of California Cities
Jennifer Henning, Esq., California State Association of Counties
Brian G. Lau, Esq., Commission Counsel
Scott J. Hallabrin, Esq., General Counsel